ARTICLES

WHY A COERCION TEST IS OF NO USE IN ESTABLISHMENT CLAUSE CASES

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I. INTRODUCTION

Of late, a number of important Establishment Clause cases have been decided on the basis of a coercion test.[1] Some important scholarly support has emerged for such an approach.[2] Certainly other Establishment Clause tests, including the three-part test enunciated in *Lemon v. Kurtzman*,[3] have been subjected to serious critique.[4] But the deficiencies of the alternative tests do not validate

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[1] Merely by way of example, see Van Orden v. Perry, 545 U.S. 677, 692, 693 (2005) (Rehnquist, C.J., plurality opinion & Thomas, J., concurring); *id.* at 707, 733 n.35 (Stevens, J., dissenting) (presenting a limited critique of the coercion test); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45, 47-54 (2004) (Thomas, J., concurring); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120-21 (2001) (Scalia, J., concurring); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310-11, 316-17 (2000); Lee v. Weisman, 505 U.S. 577, 592-99 (1992); *id.* at 599, 604-05 (Blackmun, J., concurring); *id.* at 609, 618-21 (Souter, J., concurring); *id.* at 631, 632-46 (Scalia, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Nurre v. Whitehead, 580 F.3d 1087, 1094 n. 5 (9th Cir. 2009); Green v. Haskell County Bd. of Comm'rs, 574 F.3d 1235, 1236, n.3 (10th Cir. 2009) (denying rehearing en banc); Card v. City of Everett, 520 F.3d 1009, 1013 (9th Cir. 2008) (criticizing the *Lemon* test); Books v. Elkhart County, 401 F.3d 857, 867-70 (7th Cir. 2005) (Easterbrook, J., dissenting) (establishment entails coercion); Child Evangelism Fellowship v. Montgomery County Pub. Sch., 373 F.3d 589, 597-98 (4th Cir. 2004); Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1335-36 (11th Cir. 2001).

[2] The most influential article along these lines is that of Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) (declining to define coercion); *id.* at 941 (but seeking generally to link Establishment Clause violations with the deprivation of religious liberty); *see also* Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

[3] 403 U.S. 602, 612-13 (1971).

[4] *See Lee*, 505 U.S. at 631, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon

a coercion test in the Establishment Clause area or, for that matter, in any other area of the law.[5] This Article illustrates the uselessness of coercion tests in the Establishment Clause context.

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test, . . . which has received well-earned criticism from many Members of this Court.") (citations omitted); *see also Van Orden*, 545 U.S. at 685 (Rehnquist, C.J., plurality opinion); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting) (referring to Lemon's "checkered career in the decisional law of this Court"); *County of Allegheny*, 492 U.S. at 655-56 (Kennedy, J., for a group of four Justices, critiquing the Lemon test). For a concise critique of Justice O'Connor's Endorsement test, as articulated in, e.g., Lynch v. Donnelly, 465 U.S. 668, 687, 690 (1984) (O'Connor, J., concurring) ("We must examine both what [the City] intended to communicate . . . and what message the [City's] display actually conveyed), see *Books*, 401 F.3d at 869 (Easterbrook, J., dissenting) ("Endorsement differs from establishment.") (internal quotations removed).

[5] The concept of coercion arises in many different areas of the law, but may be of no more distinctive use or value in those areas than in our Establishment Clause cases. We hold open the possibility that the actual meaning, or meanings, of coercion itself may vary, depending upon the subject matter area and context. *See, e.g.*, ALAN WERTHEIMER, COERCION 287 (1987) ("[A] proposal could constitute contractual duress, while a similar proposal would not establish duress as a defense to a crime."). For a much broader perspective on such possibilities, see, e.g., CONTEXTUALISM IN PHILOSOPHY: KNOWLEDGE, MEANING AND TRUTH (Gerhard Preyer & Georg Peter eds., 2005).

For a mere sampling of the range of legal subject matter in which the idea of coercion has been applied, see, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 618-20 (1969) (seeking to distinguish between well-founded employer predictions of probable future events beyond the employer's influence and more or less subtle threats of future employer retaliation amounting to coercion); United States v. Butler, 297 U.S. 1, 70-72 (1936) (coercion of farmers through Spending Clause inducements as exerting pressure, undermining voluntariness, and arguing that the coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful); *see also* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (finding that under the Spending Clause, and at least under the present circumstances, relatively mild and limited pressure exerted on the presumably not financially dependent states is not coercive, even if states acquiescence is uniform and predictable); Steward Machine Co. v. Davis, 301 U.S. 548, 589-90 (1937) (concluding, contrary to the general tone of *Butler*, in the Spending Clause area that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is . . . a philosophical determinism by which choice becomes impossible.") (assuming, quite controversially, that all coercive programs must successfully dictate or determine the actual outcome or the unduly influenced "choice"); *Butler*, 297 U.S. at 78, 81-82 (Stone, J., dissenting) (distinguishing between potentially coercive threats and non-coercive offers, at least in the Spending Clause context, and noting that it was not clear to many offerees whether they would be better off by accepting the subsidy in exchange for planting reduced acreage, thus weakening the case for claiming that such offers are coercive). *But cf.* Florida v. Bostick, 501 U.S. 429, 435-37 (1991) (dispute over the genuinely consensual versus subtly and circumstantially or contextually coercive nature of a random search, by two officers, of a seated passenger's baggage on a parked interstate bus scheduled to depart) (raising, implicitly, the question of whether an allegedly coercing party must have actually created

The idea of coercion appears prominently in Establishment Clause cases[6] and in a wide variety of other legal contexts.[7] The frequent use of the idea of coercion in the law, however, does not mean that the courts have always consciously held or articulated a theory of coercion.[8] The Establishment Clause cases, and the school invocation cases upon which we will focus in particular,[9] actually raise more questions about the idea of coercion than they answer. Once the major conceptual questions about coercion are answered as effectively as possible, however, we are ultimately and inevitably left to recognize the uselessness of the concept in our constitutional context.

II. SOME INITIAL MULTI-DISCIPLINARY THOUGHTS ON COERCION

There can be no doubt that the idea of coercion holds a prominent place in social and legal theory. But the general connotations of coercion seem to be much clearer than its precise meaning. In typical instances, coercion is widely thought of as morally

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some or all of the jointly constraining circumstances, or whether it is enough that the allegedly coercing party either intentionally or non-consciously takes advantage of independent constraining circumstances rendering the defendant vulnerable to coercive pressure);United States v. Ybarra, 580 F.3d 735, 738-39 (8th Cir. 2009) (regarding the potential coerciveness of a supplemental *Allen* charge to a deadlocked jury) (A potentially "unduly coercive" charge (as opposed to perhaps coercive, but not unduly coercive) is based on "the content of the instruction, . . . the length of deliberation after the *Allen* charge, . . . the total length of the deliberation, and . . . any indicia in the record of coercion or pressure on the jury." (citations omitted). The court did not further clarify whether "pressure" is, in this context, coercive (or unduly coercive) or the broader question of the relation between a prompt or a delayed jury decision and any coercive effect of the *Allen* charge.); United States v. Boomer, 571 F.2d 543, 544-45 (10th Cir. 1978) (In the context of an attempted prison escape, "coercion" is apparently treated as synonymous with both "duress" and "necessity." This requires a specific and immediate threat of death or serious bodily harm and lack of alternatives to escape, as well as other defense elements grounded in public policy rather than in the logic of "coercion" itself, such as lack of escapee violence and an intent to promptly surrender.); WERTHEIMER, *supra* note 5, at 187 ("When the federal government threatens to withhold state highway funds if a state does not raise its drinking age to twenty-one, it may be said that it is 'forcing' (or 'blackmailing') the states into compliance.").

[6] *See supra* note 1.

[7] *See supra* note 5.

[8] *See* WERTHEIMER, *supra* note 5, at 12.

[9] For the sake of convenience, our main focus herein will be on the public school invocation cases of *Lee v. Weisman* and *Santa Fe Independent School District v. Doe.*

[10] *See, e.g.*, WERTHEIMER, *supra* note 5, at xi ("[C]oercion claims are crucial to our views of various social practices and, in fact, to the adequacy of general social theories. . . .").

undesirable.[11] Coercion is commonly thought to be "physically or psychologically painful,"[12] to interfere with "individual autonomy,"[13] or to seek to degrade the object of the coercion.[14] It has been argued in particular that "to coerce a man rather than persuade him is to treat him as a thing governed by causes rather than as a person guided by reasons."[15] Descriptively, however, the idea of coercion is less clear. We may take a first descriptive step, with the leading theorist, Isaiah Berlin, by saying that "[t]o coerce a man is to deprive him of freedom."[16] But not all deprivations of freedom,[17] and not all rights violations,[18] must involve coercion. One form of this argument has been expressed by Professor Jeremy Waldron: "[L]essening options is not definitive of coercion: when a person . . . sleeps on his own floor, he lessens others' options—for they can now not make use of those resources—but he can hardly be said to be coercing them."[19]

It is difficult to go beyond this initial point without encountering controversy, but, for our purposes, here is a possible bare framework: In many—but not all—cases of coercion, there will be one or more coercing parties (A) employing or taking advantage of

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[11] *See, e.g.*, CHRISTIAN BAY, THE STRUCTURE OF FREEDOM 92 (1958) (coercion as the supreme political evil); Michael D. Bayles, A CONCEPT OF COERCION, *in* COERCION 16, 16 (J. Roland Pennock & John W. Chapman eds., 2007) (1972) ("[T]he use of coercion is generally thought to be morally bad."); J. Roland Pennock, *Coercion: An Overview*, *in* COERCION 1, 2 (J. Roland Pennock & John W. Chapman eds., 2007) (1972) ("'Liberty' is a 'virtue word': for some more than others, but it generally has a positive connotation; 'coercion' the reverse."); Peter Westen, *"Freedom" and "Coercion" – Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 547 (1985).

[12] Bayles, *supra* note 11, at 9.

[13] *Id.*

[14] Robert Paul Wolff, *Is Coercion "Ethically Neutral"?*, *in* COERCION 144, 146 (J. Roland Pennock & John W. Chapman eds., 2007) (1972).

[15] *Id.* Coercion of one competent adult person by another may, relatedly, violate basic norms of equality underlying democratic theory, though this argument may be murkier in some instances of coercion by a representative government. In any event, none of this should rule out all instances of coercion, whether of public school students or not, as invariably unjustifiable at a moral or constitutional level. On the other hand, it has been argued that societal disapproval and the diffuse pressures of market price competition can be coercive even if not deliberately or intentionally imposed. *See* Pennock, *supra* note 11, at 3-4. Unfortunately, coercion theory offers no overall consensus on this crucial point. *See infra* notes 56-62 and accompanying text.

[16] ISAIAH BERLIN, LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 168 (Henry Hardy ed., 2002).

[17] *See* JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 236 (1993).

[18] *See id.*

[19] *Id.*

some means (M) directly or indirectly to successfully or unsuccessfully induce one or more parties (B) to do or refrain from (usually) some action, belief, or choice (X).[20] This is a crude typology, merely to get the analysis underway. We shall refrain from pointing out exceptions, controversies, and complications until the need arises below, but this typology should suffice as a basic framework for the public school invocation cases discussed below.[21]

The most basic distinction among cases of coercion is between coercion that is "non-volitional" on the part of the coerced party, B, and cases of "constrained volition" on the part of B.[22] Non-volitional coercion is involved when the will of the coerced party, B, is simply overwhelmed, bypassed, rendered irrelevant, or impaired.[23] Locking B in a room could count as non-volitional coercion. In contrast, "constrained volition" coercion leaves B capable of knowingly and, in a sense, intentionally choosing between options, both of which are substantially unattractive.[24] The latter form, constrained volition, is said to be the standard case of coercion.[25] And in these latter, presumably standard, cases, it has been said that "B has no reasonable alternative but to do X [in accordance with A's wishes] and . . . it is *wrong* for A to make such a proposal to B [or otherwise place B in such a constrained choice situation]."[26]

There is much in these bare schematic accounts that will be important for our purposes, most crucially that A's constraining of B's volition must, on most accounts, be deemed "wrong" in some sense in order to count as coercion in the first place.[27] But even this most basic distinction between non-volitional and constrained volition coercion may not always be crucial to the public school

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[20] *See* WERTHEIMER, *supra* note 5, at 5 (providing a basic typology of coercion).

[21] *See infra* Section IV.

[22] *See* WERTHEIMER, *supra* note 5, at 9-10; IAN CARTER, A MEASURE OF FREEDOM 224 (1999). This distinction is also emphasized in Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717 (2005). In our cases, the distinction is either difficult to draw, or of less than monumental legal or practical significance. Of course, even a legally anonymous plaintiff in our public school cases may anticipate great social pressures and sanctions from litigating the case.

[23] *See* WERTHEIMER, *supra* note 5, at 10.

[24] *See id.* at 9-10.

[25] *See id.* at 10.

[26] *Id.* at 172.

[27] *See infra* notes 67, 81 and accompanying text. If we were to instead take coercion to be morally neutral, we would have to wonder why a morally neutral act would be an especially helpful signal that the government has committed the serious moral wrong of violating the Establishment Clause. *See infra* note 50 and accompanying text. We do not, on the other hand, prejudge whether or how coercion can be justified. *See infra* notes 91-94 and accompanying text.

religious invocation cases.[28] Consider two case scenarios. If the invocation is unannounced, or not widely publicized in advance of the school event, we may wish to say that a coerced person's will has been bypassed or rendered irrelevant through non-volitional coercion.[29] But if the invocation is anticipated, and a given student considers her options and costs, even very briefly, we may wish instead to say that any coercion involved is that of the constrained volition type.[30] Either type of coercion might be present in an invocation case.

Any theory of the proper use of the idea of coercion must certainly depend upon the best conceptual analysis of coercion that we can manage. It is useful to remember that the best conceptual analysis must ultimately be true to the insights of heroes, saints, political figures, realistic literary figures, political theorists, and philosophers, as well as those of social scientists. Such a broad and thorough analysis of coercion must remain beyond our scope. We should, however, recognize at least some brief examples of how the idea of coercion has been seen from broader perspectives.

The historical institution of chattel slavery, for example, has involved some of the severest forms of ongoing physical coercion. From this institution we learn, however, how it can also be possible that a single, determined act of defiance can have, as in the famous case of Frederick Douglass, a transforming and even liberating effect.[31] More subtly, the example of Frederick Douglass and his resistance illustrates some of the inherent limitations on coercion even under slavery: The slave master who values his reputation for successfully coercing his slaves may not always be able to afford to conspicuously punish a defiant slave, because that punishment might be perceived as evidence of the slave master's own weaknesses and limitations.[32]

The dynamics of other forms of severe coercion are explored in detail in the accounts of former Soviet dissident Natan Sharansky.[33] For example, Sharansky notes how it may be possible for a party subjected to ongoing coercive efforts to appropriate and utilize even the most threatening language of a tormenter as his or her

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[28] *See infra* Section IV (discussing the multiple possible characterizations of the circumstances of the cases discussed).

[29] *See supra* note 23 and accompanying text.

[30] *See supra* notes 24-25 and accompanying text.

[31] *See* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS 68-69 (Deborah E. McDowell ed., Oxford Univ. Press 1999) (1845).

[32] *See id.* at 69.

[33] NATAN SHARANSKY, FEAR NO EVIL (Stefani Hoffman trans., PublicAffairs 1998) (1988).

own, thereby at least momentarily disrupting the coercer's tactics.[34] Sharansky also notes the tendency of his prison interrogators to present their coercive efforts as mere attempts to thoroughly explain the legal nature of the circumstances in which Sharansky found himself.[35] Again, we understand coercion partly through logic and language, and partly through history.

Something of the nature of Stalinist coercion is illustrated in a story told of then Soviet Premier Nikita Khrushchev:

> A heckler once interrupted Nikita Khrushchev in the middle of a speech in which he was denouncing the crimes of Stalin. "You were a colleague of Stalin's," the heckler yelled, "why didn't you stop him them?" Khrushchev apparently could not see the heckler and barked out, "Who said that?" No hand went up. No one moved a muscle. After a few seconds of tense silence, Khrushchev finally said in a quiet voice, "Now you know why I didn't stop him."[36]

Ironically, in this case, we have an example of an unexpressed but pervasive form of coercion within the context of a denunciation of systematic coercive abuses.

Literary accounts of coercion, or of attempts at coercion, can be equally illuminating. Consider, for example, Fanny Price's resistance to the subtle coercive pressures exerted by Henry Crawford in Jane Austen's *Mansfield Park*.[37] Coercive social pressure has been considered an important theme in the work of the great novelist George Eliot, as well.[38] Among the philosophers, we have the cold-eyed realism of Niccolo Machiavelli, who famously argued:

> [M]en have less hesitation to offend one who makes himself loved than one who makes himself feared; for love is held by a chain of obligation, which, because men are wicked, is broken

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[34] *See id.* at 40-41.

[35] *See id.* at 40-41, 64-65.

[36] ROBERT GREENE, THE 48 LAWS OF POWER 73 (1998); *see* ALDOUS HUXLEY, BRAVE NEW WORLD (Harper Perennial 1998) (1932); GEORGE ORWELL, 1984 (Signet Classics 1961) (1949).

[37] *See* Joseph M. Duffy, Jr., *Moral Integrity and Moral Anarchy in Mansfield Park*, 23 ELH 71, 89 (1956); JANE AUSTEN, MANSFIELD PARK (1814), *reprinted in* JANE AUSTEN: THE COMPLETE NOVELS 423, 619 (2006); *Occurrences of the Words "Persuade"/"Persuasion" in the Novel [by Jane Austen] Persuasion*, http://www.pemberley.com/janeinfo/persuasn.html (last visited Nov. 6, 2010).

[38] *See* Blanche Colton Williams, *George Eliot: Social Pressure on the Individual*, 46 SEWANEE REV. 235, 239 (1938) ("*Silas Marner* . . . presents a man ruined through unjust social pressure, restored through the healthy influence of normal human beings."); *see also* JOHN STUART MILL, ON LIBERTY 63, 143-46 (Gertrude Himmelfarb ed., 1974) (1859) (discussing the power and appropriate limits of informal social pressure).

> at every opportunity for their own utility, but fear is held by a dread of punishment that never forsakes you.[39]

Less dramatically, we also have Blaise Pascal's classic suggestion that genuine changes in our attitudes and beliefs can be engineered, albeit benignly, at our own initiative,[40] but also by other parties through familiarization, routine exposure, or desensitization toward previously disfavored ideas and practices.

Social scientists have also contributed to the descriptive theory of coercion, as shown in the classic laboratory obedience experiments of Stanley Milgram.[41] Additionally, Solomon Asch's work subtly shows indirect social pressure toward public verbal agreement.[42] Regardless of the balance of individuality and conformity we may expect among public school adolescents, a degree of hierarchical or authoritative coercion and coercive peer pressure is likely to be part of any public school environment.

Though hardly religious, some elements of coercion are typically present in the public schools. After all:

> In school, a collection of youngsters comes together for stated hours each day; the students are expected to be civil to one another, to heed the dominant adult figure(s), and to sit still for relatively long periods of time so that they can master materials whose application to their daily lives seems obscure.[43]

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[39] NICCOLÒ MACHIAVELLI, THE PRINCE AND THE DISCOURSES 61 (Max Lerner ed., 1950); *see* GREENE, *supra* note 36, at 73.

[40] *See* BLAISE PASCAL, PENSEES 152 (A.J. Krailsheimer trans., 1966) (1669).

[41] *See* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 178-79 (5th ed., 2009) (highlighting the robustness of Milgram's results across time and space); STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 99-105 (1974) (seemingly normal subjects were reduced under authority to a mere "agentic" state, in which they instrumentally carried out harmful commands).

[42] *See* Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCH. MONOGRAPHS 9, 70 (1956) (discussing subtle majority social pressures against the individual's best judgment, depending in part on whether the lone individual is required to publicly announce his or her decision to a group of transient (apparent) peers, let alone a hierarchical expert authority figure, as in Milgram's experiments); Jonah Berger, *Identity-Signaling, Social Influence, and Social Contagion*, *in* UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS 181, 184-85 (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008); Hart Blanton & Melissa Burkley, *Deviance Regulation Theory*, *in* UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS 94, 95 (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008) (providing commentary and context which emphasizes adolescent peer pressure); *see also* WERTHEIMER, *supra* note 5, at 189. Again, even a legally anonymous plaintiff may face social pressures and sanctions as much for bringing the suit as they might feel in the moment of any underlying religious coercion.

[43] HOWARD GARDNER, CHANGING MINDS 135 (2006). We introduce the problem of the possible justification of some cases of coercion *infra* at notes 91-94 and accom-

Below,[44] we will apply what we know about coercion in general to the specific context of the public school invocation cases,[45] and by implication to other Establishment Clause contexts. We can assume that courts take most, though not all,[46] of the above sorts of broadly-derived insights into account in applying the idea of coercion in the invocation cases. But however courts choose to use the term "coercion" in Establishment Clause cases, they should have some grasp of our best philosophical understandings of the idea of coercion, and at least some response to such understandings where they reject the logic of the philosophers' most defensible use of the term. We now turn to a brief consideration of some of the most important problems raised by the philosophers, as they bear upon our Establishment Clause cases generally.

III. THE IDEA OF COERCION WITH AN EYE TOWARD THE ESTABLISHMENT CLAUSE CASES

A. *The Philosophical Concept of Coercion Itself*

The most philosophically careful writers about coercion have noticed that our most useful understandings of the idea of coercion are to one degree or another morally value-laden.[47] At an extreme, one might seek to use the idea of coercion in a comparatively value-free way.[48] On such an approach, deciding whether coercion is present would be largely a matter of uncontroversial empirical observation.[49] In our terms, party B publicly announces, initially, her strong intent to do something other than X, but party A then announces his preference that B do X instead, whereupon A immediately applies overwhelming physical force to B, or locks B in a room, thereby realizing A's preference in the matter and thwarting B's own expressed intention.

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panying text. The normative or evaluative qualities built into our understanding of coercion do not necessarily dictate whether instances of coercion might be ultimately justified.

[44] *See infra* Section IV.

[45] *See id.*

[46] As we shall explore below in Section III, and have already hinted at above in the text accompanying note 27, the entirely reasonable idea that coercion itself, appropriately understood, already has the idea of some degree of "wrongness" built into it—in ways relevant to Establishment Clause jurisprudence—is disastrous for otherwise attractive coercion theories of the Establishment Clause.

[47] *See, e.g.*, WERTHEIMER, *supra* note 5, at xi, 7-8.

[48] *Id.* at xi.

[49] *See id.* at xi.

In such an extreme case, coercion is said to be present or not present, as the case may be, primarily as a matter of empirical observation. Crucially, no normative or evaluative reference is made to any relevant rights, entitlements, duties, or legitimate expectations of either party. There may well be reference to resistance on the part of B to A's coercive efforts, to a comparison between A's efforts and B's resistance, or perhaps even to whether B's degree of resistance or lack thereof was either typical or unusual in a purely statistical sense. At best, we might try to make a non-normative measurement of any pain inflicted on B. But there will be no concern for whether B's rights were violated, for whether B's degree of resistance or resolve met some normative baseline degree of reasonableness or adequacy given the identities and abilities of the parties and the context, or for any other moral considerations. This sort of approach to coercion thus becomes detached, or unhinged, from what we care about in deciding important constitutional cases.

As this discussion suggests, the more typical and generally useful understandings of coercion are, in contrast, thoroughly "moralized" in various ways.[50] Moral or other normative judgment, including enforcement-worthy rights of either party, may enter in various essential ways, depending partly upon circumstances. Such moral and other normative judgments may well be controversial. As one such example, how much personal resistance to a particular effort to allegedly coerce should be minimally expected of a high school student will often be controversial in our Establishment Clause invocation cases.

Even this brief discussion should already give us serious concern. If the typically most valuable accounts of coercion are already crucially moralized, and laden with moral evaluation, including the interplay of rights and legitimate expectations, values, and interests under the circumstances, there is a serious analytical problem. Analysis of coercive efforts, and of whether those coercive efforts can be morally justified, will involve precisely the same considerations that anyone would sensibly apply in deciding an Establishment Clause case on any reasonable constitutional test. A coercion analysis adds nothing significant to what we otherwise would have considered on any reasonable, alternative theory. A coercion analysis is thus, in our contexts, pointless.

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[50] *See id.* at xi, 7-8, 258 (noting and further discussing the sheer impracticality, in most legal contexts, of relatively non-moralized conceptions of coercion). We take no position on the much broader question of the proper balances between descriptive and evaluative language in formulating constitutional tests in general.

In sum, our best and most generally useful theories of coercion, and of justified and unjustified coercion, incorporate concerns and elements of any sensible test for the violation of the Establishment Clause. A coercion test duplicates what we would sensibly consider anyway in deciding Establishment Clause cases, in the absence of a coercion test. It is also possible that whatever we might reasonably choose to think about in order to resolve our Establishment Clause cases could be built into some plausible theory of what coercion, or justified coercion, means in the Establishment Clause context.[51] Thus the literal uselessness of any familiar coercion test in these cases is apparent.

B. Coercion, Context, Baselines, and Moralization

To begin to see this, we can start by recognizing that coercion, or the absence of coercion, is typically a contextual matter.[52] In general, the law typically recognizes that the presence or absence of coercion depends on context and circumstance.[53] We can, for the moment, just assume that coercion is a binary concept—that it is either present or not present, and does not awkwardly come in degrees, for constitutional purposes. On this simplifying assumption, then, an initial problem is that neither theories of coercion, nor coercion tests for the violation of the Establishment Clause, can provide us with a consensual basis for deciding how to conceive of the relevant context. Contexts may be taken narrowly or broadly. Even more crucially, what counts as a relevant element of the context, its proper description, and certainly its degree of significance, will be easily contested by persons who are trying to understand and apply the idea of coercion in an Establishment Clause case. Does, for example, a particular formal disclaimer count? For how much? Here in particular, looking to the idea of coercion to clarify or simplify the proper adjudication of Establishment Clause cases is already, to this extent, a useless endeavor.

But let us move beyond such matters. Some of the further unavoidable uncertainties of any coercion analysis involve problems of

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[51] *See infra* Section III.B-D.

[52] *See, e.g.*, WERTHEIMER, *supra* note 5, at 184 ("[C]oercion claims are emphatically and technically contextual.").

[53] *See id.* at 172 ("In determining what counts as a *reasonable* alternative [in the context of arguably coercive choice situations], the law adopts a *contextual* and *moralized* approach."); *see also id.* at 189 ("In some cases, informal pressures are sufficient to coerce; in other cases, only those pressures sufficient to negate responsibility are coercive.").

choosing a "baseline"[54] position from which to evaluate B's status, when B is allegedly subjected to coercive influence by A. B's baseline may be, on some theories of coercion, a matter of B's current actual welfare; B's currently recognized rights and entitlements; or an even more explicitly normative baseline, such as what B has or should have a right to expect, whether anyone currently recognizes those rights or not.[55] To choose a proper baseline, we would inevitably be drawing upon the same sorts of considerations that already drive debate, apart from the idea of coercion, in the Establishment Clause cases.

We have also already seen that the leading theorists of coercion in general disagree among themselves on the crucial issue of whether persons purportedly exercising coercion must intend to be exercising coercion.[56] Perhaps not just the coercive influence itself, but the intent on the part of A to exercise coercion may be a matter of degree. But essentially these debates are again already built into Establishment Clause jurisprudence on other theories.

In the public school invocation and commencement cases, the question of intent is already debated on any familiar Establishment Clause theory, including the first prong of the *Lemon* test[57] and the O'Connor Endorsement test.[58] Certainly, a school may argue that its institutional intention is not to coerce anyone, even through the foreseeable adverse reactions of witnesses and others toward any non-conformists. What coercion tests might phrase in terms of whether a government indirectly or subtly coerces anyone merely reflects standard concerns over significant state purposes[59] and primary effects[60] under *Lemon*, or the government's intent[61] and its

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[54] *See generally id.* at 204, 211. Professor Wertheimer goes on to argue that "[r]elative to one's baseline, a threat reduces one's available options whereas an offer increases them." *Id.* at 211. We shall herein avoid the largely irrelevant question of coercive offers. *See, e.g.*, Robert Stevens, *Coercive Offers*, 66 AUSTRALASIAN J. PHIL. 83 (1988). But whether we are being coerced or not, and the degree of any coercion involved, is typically at least as much a matter of the absolute and the relative value of the options available to B as it is the sheer number of such options. *See, e.g.*, CHRISTINE SWANTON, FREEDOM: A COHERENCE THEORY 80, 162 (1992).

[55] *See, e.g.*, WERTHEIMER, *supra* note 5, at 211.

[56] *See supra* note 15 and accompanying text; BAYLES, *supra* note 11, at 19, 20 (a coercer must intend the coercive effect).

[57] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose. . . .").

[58] *See* Lynch v. Donnelly, 465 U.S. 668, 687, 690 (1984) (O'Connor, J., concurring) (referring to the government's actual, as well as perceived, intent).

[59] *See Lemon*, 403 U.S. at 612-13 (stating the first prong of the test, the "purpose" prong).

[60] *See id.* (stating the second prong of the test, the "effect" prong).

reasonably perceived intent[62] under an Endorsement Test. Again, coercion tests offer us no distinctive benefit.

Do coercion tests perhaps offer a distinctive advantage in directing our attention to whether B, the alleged coercee, had no reasonable choice but to act in accordance with A's wishes?[63] Alan Wertheimer writes that "having 'no *acceptable* alternative' but to succumb to a coercive proposal is . . . a necessary condition of being coerced, but that it, too, is a moralized condition."[64] Whether a supposedly coerced person has an "acceptable" alternative requires our separate judgment about what should be considered acceptable. This problem in coercion theory combines elements of our concerns above for context and circumstance,[65] for choosing a proper "baseline"[66] condition for B, as well as for the broader inescapably "moralized" character of the very idea of coercion.[67]

Coercion theorists who write of the lack of any reasonable alternative to the coerced choice must try to offer some account of this condition. Typically, the focus is on the choice of conforming as markedly superior[68] to the threatened alternative, or considerably greater[69] in its utility, with the threatened alternative being ineligible for B as a reasonable, normal person.[70] Typically, though, these considerations will involve choosing from among the same normative assumptions and baseline possibilities already at work in other theories in the relevant Establishment Clause jurisprudence. In the invocation cases, clearly, discussion of the expectations held of children and adolescents with respect to their alternatives and

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[61] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (referring to the "purpose" prong in the context of the Endorsement test).

[62] *See id.* (O'Connor, J., concurring) (referring to the "effect" prong in the context of the Endorsement test).

[63] We set aside the question of whether this clam about coercion is actually true on the best theory of coercion.

[64] WERTHEIMER, *supra* note 5, at 267.

[65] *See supra* notes 52-53 and accompanying text.

[66] *See supra* notes 54-55 and accompanying text.

[67] *See supra* note 27 and accompanying text.

[68] WERTHEIMER, *supra* note 5, at 193.

[69] David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121-24 (1981).

[70] KRISTJAN KRISTJANSSON, SOCIAL FREEDOM: THE RESPONSIBILITY VIEW 51 (1996). Instead, one could look at the incentives or choices themselves as either reasonable or unreasonable. *See, e.g.*, Bernard Gert, *Coercion and Freedom, in* COERCION 30, 32 (J. Roland Pennock & John W. Chapman eds., 2007) (1972) ("A man who acts voluntarily, but only because of some unreasonable incentives, does not act freely.").

any appropriate fortitude or resistance to peer pressure is present in any serious theory.[71]

C. Children, Heroes, Martyrs, Saints, and Failed Coercion

The inescapably normative character of discussions of coercion is highlighted by the fact that, occasionally, persons subject to coercive pressure successfully resist where most would say there was no reasonable alternative to compliance. A plaintiff adolescent in a public school commencement case should certainly still have standing even if he or she conspicuously avoids or ignores the invocation, and perhaps re-enters for the remainder of the program, with minimal concern for the disapproval of others. Such an adolescent might be considered a reduced-scale version of a hero, martyr,[72] or saint, as in the cases, arguably, of Joan of Arc,[73] Thomas Becket,[74] Thomas More,[75] Galileo,[76] or Oscar Romero.[77] The reduced-scale student hero, martyr, or saint also raises the conceptual problem of whether there can be failed coercion or perhaps only failed attempts at coercion. Whether a particular school can be constitutionally guilty of religious coercion under a coercion test may hinge on how we choose to resolve this problem. Some coercion theorists appear to argue that, by definition, coercion must be successful, in that a coerced party must do the coercer's bidding.[78] If B does not

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[71] *See generally, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992).

[72] *See* WERTHEIMER, *supra* note 5, at 197.

[73] *See, e.g.*, MARK TWAIN, JOAN OF ARC (Ignatius Press 1989) (1896).

[74] *See, e.g.*, T.S. ELIOT, MURDER IN THE CATHEDRAL 69 (1935) ("Death will come only when I am worthy, And if I am worthy, there is no danger."); *id.* at 74 ("[M]y whole being gives entire consent.").

[75] *See, e.g.*, ROBERT BOLT, A MAN FOR ALL SEASONS 141 (Vintage Books 1990) (1962) ("We must stand fast a little—even at the risk of being heroes."); *id.* at 121 ("I can't give in, Howard. You might as well advise a man to change the color of his eyes.").

[76] For the case of Galileo, see MAURICE A. FINOCCHIARO, THE GALILEW AFFAIR: A DOCUMENTARY HISTORY (1989); ERNAN MCMULLIN, THE CHURCH AND GALILEO (2005); THE CAMBRIDGE COMPANION TO GALILEO (Peter K. Machamer ed., 1998).

[77] *See, e.g.*, JAMES R. BROCKMAN, ROMERO: A LIFE (rev. ed. 1989).

[78] *See, e.g.*, BAY, *supra* note 11, at 93 (defining coercion as "*the application of actual physical violence*, or . . . *sanctions sufficiently strong to make the individual abandon a course of action or inaction dictated by his own strong and enduring motives and wishes*"); Bayles, *supra* note 11, at 17 ("[C]oercion involves both the success of the coercer and in some sense the voluntary action of the person coerced."); Virginia Held, *Coercion and Coercive Offers*, *in* COERCION 49, 50-51 (J. Roland Pennock & John W. Chapman eds., 2007) (1972) ("Coercion is the activity of causing someone to do something against his will, or of bringing about his doing what he does against his will.").

comply, then B supposedly cannot possibly have been coerced. Other theorists appear to disagree and argue that, in some sense, genuine coercion may or may not succeed.[79]

There may be cases in which A coerces B merely for the sake of "toying" with B, as it were. In such cases, A may simply delight in the coercing of B, without much caring whether B does what avoids a heavy penalty, or instead actually suffers the heavy penalty A imposes. But these cases will be unusual in the religion clause area.

If a coercion theory were to distinctively contribute to our public school invocation cases, it would, at a minimum, have to offer one view or another of whether genuine coercion can be unsuccessful in exacting B's compliance. The special problem here, from our perspective, is that the established case law already independently knows the right answer, even before the divided coercion theorists arrive at a consensus on this point. Consider again the case of the scaled-down adolescent hero who, respectfully but conspicuously, declines to participate in an invocation knowing that he or she will thereby incur, perhaps as intended or foreseen by the school, some real and substantial cost beyond mere discomfort. On any sensible approach, such a student has standing,[80] whether the coercion theorists wish to say that she was coerced or not. The coercion analysis would again, and at best, add nothing.

Actually, some of the disagreement among coercion theorists in this regard may be largely verbal. We would, of course, not normally say that B was coerced into doing X unless B had actually done X. But as the cases of the heroes, martyrs, and saints, secular and otherwise, illustrate, objectionable religious coercion by the government is not confined to cases of actual compliance. In cases of non-compliance or unsuccessful government coercion, we might still say that the government directly or indirectly exerted coercive pressure; or encouraged coercive pressure; or took advantage of

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[79] *See, e.g.*, Gert, *supra* note 70, at 37 (referring to cases in which a person is being coerced to do X but does not do it, in spite of the coercing). More ambiguously, see Pennock, *supra* note 11, at 8 ("[I]t is certainly true that we say 'He tried to coerce me into doing X, but I refused.' He only tried; he did not succeed."); Westen, *supra* note 11, at 561-63; James Stacey Taylor, *Autonomy, Duress, and Coercion, in* AUTONOMY 127, 134-35 (Ellen Frankel Paul et al. eds., 2003) (discussing the views of Harry Frankfurt).

[80] On our assumption, a student with exceptional fortitude has chosen a path of non-compliance at commencement, following her conscientiously held beliefs, at whatever social price may then be exacted. Returning to our more dramatically heroic examples above, presumably the estate of a martyr officially executed on grounds of religious unorthodoxy would have standing to object on something like Establishment Clause (and free exercise, and free speech) grounds, even though the executed party never betrayed her religious principles.

coercive circumstances; or subjected B to coercive influence; or was somehow responsible for coercive influences, whether those influences were successful or not. We could, in some such cases, very defensibly find standing and an Establishment Clause violation even as we wait for coercion theorists to reach consensus on this point.

D. Coercion, a Right to Coerce, and Justified Coercion

Our concern for context, for assigning a proper "baseline" condition for those subjected to coercion, and for the "moralized" character of inquiries into coercion lead us to a further problem for supposedly distinctively useful coercion tests in our Establishment Clause cases. Ordinarily, the law holds that A cannot possibly be coercing B if A is acting as A has a right to do.[81] To the extent that this is so, or that coercion theorists assume it to be so, the independent value of a coercion test in our Establishment Clause cases is again nullified. The problem for coercion theories here is quite clear. In order to decide whether the government's activity counts as coercion, we must first ask whether the government had a right to act as it did, under the circumstances, toward the public school students involved. And this is, of course, a matter ultimately addressed by other, competing theories of the Establishment Clause.

This is a matter of the highest importance. A coercion test for Establishment Clause cases must adopt some appropriate "baseline" for party B, which implies some limitations on the state's conduct. But setting B's appropriate "baseline" normally "would require nothing less than a complete moral and political theory . . . ."[82] The coercion test advocate obviously cannot possibly short-circuit this broad inquiry by looking to the student's constitutional rights under the circumstances. That would obviously be question-begging. The point of a coercion test is to discover the respective constitutional rights of the school and of any dissenting students; it is not

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[81] *See, e.g.*, WERTHEIMER, *supra* note 5, at 287 ("[T]he moral baseline account of coercive proposals explains why it is (ordinarily) not legally recognizable coercion to threaten to do something one has a right to do."), 172 ("It is ordinarily not coercion if A proposes to do what he has an independent legal right to do, so long as the right is not abused or used for purposes that the law considers illegitimate."), 201 (citing for this basic point the work of the philosopher Robert Nozick); Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 84 (1981) ("[T]rue duress or coercion results when one's rights are violated by others—something not always present when one has a hard choice to make under pressure.").

[82] WERTHEIMER, *supra* note 5, at 217.

meant to assume the contours of those constitutional rights at the beginning of the analysis.

Related to this point, one well-known theorist holds that to know whether coercion is present or not, one must consider the "amount of evil"[83] that would flow from both complying and not complying with the acts the school is arguably seeking to coerce, and whether any violations of a moral rule would thereby be involved.[84] The bottom line here is that in such a coercion "test" for Establishment Clause violations, determining the very presence or absence of coercion itself involves many of the same, if not even broader, moral inquiries as are involved in Establishment Clause cases on any reasonable theory.[85]

By way of further example, consider applying either the first two prongs of the Lemon test[86] or the O'Connor Endorsement test[87] in a typical public school commencement invocation case. Now, perhaps either or both of these tests could reach constitutionally defensible results without having to undertake the entire broad inquiry into rights and morality required by the idea of coercion itself.[88] That would amount to a dramatic advantage over tests based on the idea of coercion.

But realistically, the *Lemon* test and the Endorsement test, in our case, implicitly require some sort of moral inquiry. In a typical public school invocation case, as in many other Establishment Clause cases, the school and any dissenting students may jointly be able to cite a number of arguable purposes and principal effects of the invocation, and then debate their significance.[89] At some point, beyond debating matters of credibility, sincerity, and observable fact, moral judgments concerning the respective rights and legitimate authority of the parties would be made under the familiar Establishment Clause tests. As merely one example, normative judgments would be made under the Endorsement test, in particular, as to whether any dissenting students can reasonably consider themselves, because of the invocation in question, to be second-class citizens, or outsiders in their own community.[90]

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[83] Gert, *supra* note 70, at 43.

[84] *See id.*

[85] *See* WERTHEIMER, *supra* note 5, at 8.

[86] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (discussing the secular legislative purpose test and the primary effects test).

[87] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

[88] *See supra* notes 81-85 and accompanying text.

[89] *See Lemon*, 403 U.S. at 612-13.

[90] *See Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).

Thus again all reasonable Establishment Clause tests must occasionally involve controversial, basic moral judgments. If anything, coercion tests will often involve broader, deeper, and more controversial moral judgments than some competing Establishment Clause tests. At the very most, coercion tests offer to the courts no advantage in this regard.

Beyond this crucial result, there are further good grounds for concluding that coercion tests are plagued with distinct, additional problems. The problem, here in particular, is that many coercion theorists sensibly conclude that however gravely objectionable coercion in general may be, coercion may in some cases be morally[91] justified.[92] The additional constitutional problem then seems clear: If the relevant sort of coercion in the public school invocation cases can sometimes be morally justified, it is, at the very least, hard to see why such coercion should always imply a constitutional violation. What started out as a coercion test—whatever the variety of coercion test we may choose—becomes an even murkier, more complex, and less independent unjustified coercion test.

If we find an instance of coercion to be truly unjustified, the lack of justification for the coercion, and not the finding of coercion itself, may thus be doing most of the important constitutional work. However, if we find the instance of coercion to be morally justified, it is, at best, unclear why the school's action should always, or even sometimes, be held unconstitutional. Would a coercion test in this area ever find genuine governmental coercion, but then apply, say, strict scrutiny?[93] What would then count as a state inter-

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[91] Again, if the justification were assumed to be constitutional, rather than moral, the case would already be over, in favor of the state.

[92] *See, e.g.*, Bayles, *supra* note 11, at 25 ("[C]oercion might produce goods of greater value than the freedom in question."); Held, *supra* note 78, at 61 ("[C]oercion is not *always* wrong (quite obviously: one coerces the small child not to run across the highway, or the murderer to drop his weapon) . . . ."); Held, *supra* note 78, at 62 (noting the role of coercion in pollution control, safety regulations, and more generally in matters of justice and fairness); Pennock, *supra* note 11, at 10 ("[I]t is . . . obvious that in many situations coercion is justified."); Wolff, *supra* note 14, at 145 ("[T]he evil of coercing men is frequently outweighed by the good which flows from the coercion."); Rodney K. Smith, *Conscience, Coercion, and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917, 958 (1993) ("[S]ome government actions, coercing as they must, are acceptable and others are not."); *see also* BAY, *supra* note 11, at 94. *But cf.* BAY, *supra* note 11, at 94 ("Coercion can be justified only if it serves to reduce the occurrence of worse kinds of coercion.").

[93] *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (discussing the basic logic behind a strict scrutiny test in a racial classification case).

est sufficient to justify the religious coercion in question?[94] The coercion test itself would be contributing little.

Part of the deep, underlying problem is that if we are concerned about the freedom of religion, or the freedom of conscience, of potentially dissenting students (or about freedom or liberty in general) we must recognize the inevitable limits of the idea of coercion. Coercion, as it is typically understood, may well be, as the late philosopher and theorist of coercion Robert Nozick discussed, a narrower idea than that of being made unfree or being denied liberty, whether in the religious realm or not.[95] And freedom or lack of freedom itself may be constitutionally important. This would further limit the usefulness of a coercion test in the Establishment Clause area. Overall, then, any possibility of any distinctive usefulness of a coercion test in the Establishment Clause area has by now dissolved.

IV. THE PUBLIC SCHOOL INVOCATION CASES AND THE IDEA OF COERCION

A. Lee v. Weisman *and Coercion*

The epicenter of coercion-based analyses in the Establishment Clause cases, and certainly in our public school invocation cases, is the majority opinion in *Lee v. Weisman*, written by Justice Kennedy.[96]

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[94] *See generally* Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 597 (4th Cir. 2004) (discussing constitutionally permissible forms of coercion, and stating: "[S]chool administrators can 'coerce' student action of all kinds without engaging in *unconstitutional* coercion; they can even require student contributions to a fund that ultimately supports a religious organization without running afoul of the Establishment Clause.") (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841-46 (1995))).

[95] *See* ROBERT NOZICK, SOCRATIC PUZZLES 15 (1997) ("[C]oercion . . . does not exhaust the range of nonliberty or unfreedom."); *see also supra* note 17 and accompanying text.

[96] *See* Lee v. Weisman, 505 U.S. 577, 586-99 (1992). Justice Kennedy's analysis, present in his majority opinion for the Court, has been the source of much commentary. *See, e.g.*, Kent Greenawalt, *The Rehnquist Court: Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 162 (2004) ("The key to the prayers for Kennedy was coercion. Graduation ceremonies may not be formally mandatory, but in practical terms attendance is regarded as obligatory. Students who have to stand or bow their heads during a prayer might feel coerced into signaling acceptance of practices in which they do not believe."); Paulsen, *supra* note 2, at 25-48 (commented upon by Ronald C. Kahn, *God Save Us From the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983 (1993)); Kristin J. Graham, Comment, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation*, 42 BUFF. L. REV. 147, 177-83 (1994); Cynthia V. Ward, Essay, *Coercion and Choice Under the Establishment Clause*, 39 U.C.

Lee involved a public school administration's invitation to a rabbi in the Providence, Rhode Island area to deliver a brief and purportedly non-sectarian[97] invocation and benediction at a middle-school commencement ceremony. An initial complication arises: Public school prayers are sometimes led by members of specific religious denominations that cannot plausibly be said to be politically dominant within the jurisdiction in question. Any coercion in *Lee* must, therefore, take some subtler form than that of the area's dominant religious denomination seeking, briefly, to allegedly coerce nonadherents. The speaker may, of course, perceive the prayer as nonsectarian,[98] with the potentially coerced parties consisting, in part, of persons with no serious personal objections to the content of the prayer itself, but mainly to its recitation in a coercive context.[99]

Given the brevity of the prayers,[100] it would be difficult to argue that they might prompt religious conversions through the persuasive force of the rhetoric or any argument they embodied. While the commencement ceremony was not in any formal sense a matter of required attendance,[101] there was socially-induced pressure or expectation of attendance.[102] The problem here is, again, that of proper baseline setting.[103] Given the relevant circumstances, does the pressure to attend—perhaps applied in part by the govern-

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DAVIS L. REV. 1621, 1659-61 (2006); *see also Lee*, 505 U.S. at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."); *Lee*, 505 U.S. at 621 (Souter, J., concurring) ("[L]aws that coerce nonadherents to 'support or participate in any religion or its exercise' would virtually by definition violate their right to religious free exercise." (citing County of Allegheny v. ACLU, 492 U.S. 573, 659-60 (1989) (internal citation omitted))).

[97] *Lee*, 505 U.S. at 581. A moment's reflection should make clear that the idea of a neutral, non-sectarian, or even an inclusive prayer is incoherent and certainly unattainable. Instead, a prayer might be said to be, at most, relatively neutral, non-sectarian, or inclusive only by a contemporary version of broad Lockean liberal standards; broadly, Lockean liberal standards are familiar, but are hardly religiously neutral. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 211 (Ian Shapiro ed., 2003) (1689).

[98] *See Lee*, 505 U.S. at 581.

[99] By analogy, we can imagine, say, registered Democratic party parents objecting to coerced attendance at, or participation in, official public school endorsements of the Democratic Party. In this constitutional context, we need take no position on whether any coercion can be involved in being forced or required to do what one would otherwise wish to do.

[100] *See Lee*, 505 U.S. at 583.

[101] *Id.*

[102] *See id.* at 586 ("Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . .").

[103] *See supra* Section III.B.

ment, or merely somehow taken advantage of by the government—amount to (unjustifiable) coercion?

Realistically, judicial opinions are unlikely to provide convincing answers to questions that continue to divide the leading specialist philosophers. In *Lee*, Justice Kennedy asserted, "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[104] Under the circumstances in *Lee*, Justice Kennedy concludes that genuine coercion is also crucially present in subtle social pressures[105] such that a student may have had no real alternative which would have allowed her to avoid the fact or appearance of participation.[106]

Justice Kennedy emphasizes not only the subtlety, but the indirectness and the multiple sources,[107] including peers and other social influences, of the coercion held to have been present.[108] The government's involvement in the ceremony itself, from start to finish, presumably establishes sufficient state responsibility[108] for the coercive pressures exerted by non-governmental actors, given the general foreseeability of peer[110] and other social pressures, whether the government intended or welcomed such coercive pressures or not. The coercion theorist must resolve whether the school, in the invocation context, must itself have intended to exercise (coercive) influence, at least indirectly, for its acts to violate the Establishment Clause. If one or more peers or audience members intend to impose some informal social cost on a dissenting student, would the intent underlying that social disapproval always be attributable also to the school?

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[104] *Lee*, 505 U.S. at 587 (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[105] *See id.* at 588, 592.

[106] *Id.* at 588.

[107] *See id.* at 592-93

[108] *See id.*

[108] While there is clearly sufficient state action in general for Section 1983 purposes, it will often be debatable whether the school can be sufficiently linked to any alleged coercive pressure of private persons, even those required to be present, or of mere audience members. For background, see generally R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U. L. REV. 685 (1989).

[110] *See supra* note 42.

We have already seen the general philosophical dispute over the extent to which coercion requires at least some form of intent.[110] At the level of a simple hypothetical philosophical case, it seems plausible to argue that A does not coerce B in unintentionally locking B in a room—both the intent and any relevant purpose on the part of A seem to be missing. But the typical public school invocation cases will, in this respect, be far murkier on the question of intent. Suppose there is little evidence in the record that the school anticipated or welcomed not just mild social disapproval of any dissenter, but sufficient social disapproval as to rise to the level of coercion. Should the court nonetheless find sufficient intent on the part of the government to hold the government's actions coercive? Or to sufficiently partake of private efforts at coercion? Justice Kennedy actually seems to impose some sort of government intent requirement.[111]

Justice Kennedy then turns to the issue of the religious element of the purported coercion. As formulated by Justice Kennedy, the problem takes this form: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[112] The circumstances in which a "respectful silence"[113] will differ from mere neutral silence, without any clear inference of respect or lack of respect, seem too subtle for consistently accurate judicial resolution, especially on appeal. But it is also debatable whether the religious practitioners in this kind of case are always seeking the respect of non-believers or believing separationists for their religious practices.[114] The idea of respect in this sense may not realistically capture the actual capacities of all middle school students to begin

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[110] *See supra* notes 15, 56 and accompanying text.

[111] *Lee*, 505 U.S. at 594. Some cases may allow for application of the idea that the school is responsible for the natural and probable consequences of its own intentional acts, including consequences of a coercive character. *See generally* Harris v. Richards, 867 P.2d 325 (Kan. 1994) (imputing an intent to injure from the insured's action, firing two shots from a shotgun into a dark car). But Justice Kennedy may be imposing a stronger government intent, or at least a conscious utilization, requirement in arguing that "government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Lee*, 505 U.S. at 594. It seems possible that a school might not have intended coercion at the time of the invocation ceremony, but then have encouraged or done nothing to discourage an unanticipated negative reaction to a protesting student.

[112] *Id.* at 592.

[113] *Id.* at 593.

[114] *Id.* at 592.

with. But even if so, some of the religious practitioners in question may not really be seeking respect for some discrete two minute religious practice, or even for the religious beliefs underlying that practice. Instead, the presumed desire for respect in question may, in some cases, be less religious than person-oriented, classmate-to-classmate solidaristic, sentimental, or collegial.

Perhaps the idea in such a case is sometimes more like: minimally respect me, for two minutes, merely as a fellow student with shared experiences, whatever my beliefs or practices may be on this occasion. Of course, the non-believers or separationists could equally make similar, essentially secular, arguments in favor of respect flowing in their own direction. But in such cases, we would then have conflicting, basically secular, arguments about coercion, divisiveness, deference, collegiality, or majority and minority rights, with no essential reference to religion or the establishment thereof.

Whether any passive dissenter's inactivity could reasonably be construed as voluntary endorsement of a religious practice is partly a matter of a sensitive understanding of context and convention,[115] along with the judicial choice of how best to moralize the idea of coercion in that context.[116] Even more specifically, a coercion test must eventually decide how much, if any, weight to attach to official disclaimers[117] that indicate silence or passivity should not be construed as agreement with the prayer in question.[118] Again, the area is sufficiently complex, contextualist, and particularist to discourage confidence in appellate judicial resolutions.

Ironically, though, the clearer the evidence that any silence or passivity is being coerced, the less reasonable it is to infer that any dissenter actually believes in the content of the prayer, or has abandoned separationism. The greater and more obvious the coercion, the less can be inferred of any coercee's genuine beliefs.[119]

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[115] Just as silence in some well-defined contexts may indicate voluntary consent, so elsewhere, silence may equally clearly indicate resentment or uncommitment and non-involvement. Whether appellate courts are especially good at making these subtle distinctions is, again, questionable.

[116] *See supra* Section III.B.

[117] For discussion of some difficult issues in the legal status and value of disclaimers generally, see R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85 (2008).

[118] For an argument that a (presumably sincere) disclaimer would suffice to allay any misperceptions in this regard, see *Lee*, 505 U.S. at 644-45 (Scalia, J., dissenting).

[119] For a similar observation, see Wooley v. Maynard, 430 U.S. 705, 719, 721-22 (1977) (Rehnquist, J., dissenting) (arguing that the legally mandatory display of a state motto on a license plate gives us no grounds to infer the actual state of mind of any individual automobile driver).

Of course, this should hardly allay a dissenter's concerns over coercion. There remains the sheer indignity[120] and, even over a minute or two, possible vulnerability to outside influence that can be interpreted as improper.[121] But the problem of whether perceived coercion, or subjectively felt coercion, should be treated as actual coercion for Establishment Clause purposes remains real and daunting, on any coercion theory.

On Justice Kennedy's own approach, "[t]here can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer."[122] At least in the absence of sufficiently credible disclaimers, Justice Kennedy's approach would view a dissenting student's only path to retaining religious integrity as requiring not just silence, but some visible and recognizable protest.[123] But any such protest, whatever its possible legal significance, would typically be discouraged by peer or other social pressure.[124]

As to the question of whether an instance of religious coercion can, on some further test, ever be constitutionally justified, Justice Kennedy does use the phrase "unacceptable constraint."[125] But it is left unclear by Justice Kennedy whether this phrase signals a distinction between constitutionally justified and unjustified coercion. Middle school authorities, of course, exercise presumably justified, but non-religious, coercion of all students on a recurring basis. Could any religious coercion ever be justified in a school setting, assuming that the circumstances in *Lee* count as coercive?

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[120] *See supra* notes 12-15 and accompanying text.

[121] On one hand, most coercive plots to steer the students' thinking would likely require more than a minute or two of vaguely theological references almost literally as the student is walking out the door. But on the other hand, such students may be at an especially vulnerable time and an especially vulnerable age, with little or no personal experience with formal public ceremonies and correspondingly little sense of how to process them. Again, it may often be difficult to envision appellate courts as especially well-qualified to moralize or generally flesh out and give substance to any particular theory of coercion, and then apply that theory in context.

[122] *See Lee*, 505 U.S. at 593.

[123] *See id.*

[124] *See id.* at 593-94 (citing social science peer-pressure literature).

[125] *Id.* at 594; *see also* Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 597 (4th Cir. 2004) (stating "school administrators can 'coerce' student action of all kinds without engaging in *unconstitutional* coercion; they can even require student contributions to a fund that ultimately supports a religious organization without running afoul of the Establishment Clause.") (citing Rosenberger v. Visitors of Univ. of Va., 515 U.S. 819, 841-46 (1995)).

Imagine, perhaps, an incident of natural disaster or serious violence at a rural middle school, in which the school promptly asks for the presence of grief counselors,[126] most of whom turn out to be religiously affiliated; the school then immediately provides grieving students with grief counselors with no consideration given to religion. Suppose that a grief counselor suggests that a grieving student pray, or listen in respectful silence to a vague prayer. Assuming that religious coercion is present, could the school's role in the coercion in this rare instance ever be constitutionally justified?

The problems of indirect or largely social and non-organized coercion, as well as of coercion's possible justifiability, have long been of general concern within the liberal tradition. John Stuart Mill's work[127] is doubtless the best known within this tradition. According to Justice Kennedy's approach in *Lee*, a student in the plaintiff's position is not free[128] to absent herself from the middle school graduation ceremony. The dissenting student's perceived conformity "was too high an exaction to withstand the test of the Establishment Clause."[129] Whether Justice Kennedy means to suggest that all deprivation of freedom in this context must also amount to coercion[130] is unclear. Pronouncing the cost to the dissenter to be too high[131] is nevertheless a matter of setting a baseline and of a moralized fleshing out of the concept of coercion by the Court.

Actually, Justice Kennedy's chosen baseline and his chosen form of moralization of the idea of coercion are controversial even by the classic, but vague, standards of John Stuart Mill. Mill, whose doctrine admittedly focuses on mature adults as distinct from school children,[132] recognizes the difficulties in drawing lines, even on general principles, given the complications and conflicting in-

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[126] For background, see Mary Jean Dolan, *Government-Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life*, 35 HASTINGS CONST. L.Q. 505 (2008).

[127] *See generally* MILL, *supra* note 38; *see also* Alan Ryan, *Mr. McCloskey on Mill's Liberalism*, 14 PHIL. Q. 253, 254 (1964) ("Mill's concern in *On Liberty* is not for the individual against the State, but rather for the individual against all forms of social pressure. . . .").

[128] *Lee*, 505 U.S. at 595.

[129] *Id.* at 598.

[130] See the discussion by NOZICK, *supra* note 95, suggesting that, generally, coercion does not exhaust the scope of all deprivations of freedom. *See also supra* notes 17-19 and accompanying text.

[131] *Lee*, 505 U.S. at 598.

[132] MILL, *supra* note 38, at 69. For personal background involving the social response to Mill's relationship with Harriet Taylor, see JOHN STUART MILL, AUTOBIOGRAPHY (Penguin Books 1990) (1873).

terests. Mill famously recognizes that the social tyranny of majority sentiment, even without the conscious support of the state, can in some ways be especially coercive.[133] Such a social tyranny, "though not usually upheld by . . . extreme penalties, . . . leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."[134] Presumably a social tyranny of the majority over adolescents, when supported, incited, or taken advantage of by a public school administration, can be even more coercive.

But on the other hand, Mill is also deeply interested, for both children and adults, in the development of firm, resilient, steadfast, and persevering individual character.[135] As an empirical matter, there may sometimes be a tradeoff between promoting such character and invariably shielding even middle school or high school children from exposure to brief prayers at commencement.

As well, Mill holds that those private persons who disapprove of dissenting beliefs and behaviors have a right to act on that disapproval, in ways short of punitiveness or coordination with government sanction.[136] The social majority is, according to Mill, generally within its rights in discreetly refusing to associate with a dissenter; the heart of Mill's conclusion is that:

> We have a right, also, in various ways, to act upon our unfavorable opinion of anyone, not to the oppression of his individuality, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance) . . . . We have a right, and it may be our duty, to caution others against him if we think his example or conversation likely to have a pernicious effect . . . . [H]e suffers these penalties only in so far as they are the natural and . . . spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment.[137]

Mill is plainly seeking some sort of balanced view regarding purely private or social disapproval of the dissenter. Line-drawing here at the level of principle will be difficult. Presumably, we may

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[133] MILL, *supra* note 38, at 69.
[134] *See id.* at 63.
[135] *See generally* John Stuart Mill, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 10, 2007), http://plato.stanford.edu/entries/mill/.
[136] *Id.* at 144-47.
[137] MILL, *supra* note 38, at 144, 177.

appropriately communicate our disapproval to the dissenter and the dissenter's potential associates, but we must not parade[138] our disapproval. Even if this line between communicating and parading can be drawn in theory, we must ask whether, with respect to social coercion, it is the right line. Or again, according to Mill, the dissenter's actions may legitimately evoke social penalties,[139] but not social punishment.[140] How useful, in theory or practice, will a social penalty versus social punishment distinction be? Factoring in the ways in which a public school might then promote, or take advantage of, such a social reaction in a religious context then compounds the uncertainties and the persisting controversies.

Public prayer in a public school context is, of course, a very different and special case. But Mill implicitly recognizes that even the indignities, upset, and alienation engendered by similar such occasions may be part of a necessary and important broader conflict of values. Minimizing in every context the pain of a mutual clash of world views may, to Mill, come at the eventual price of reduced intellectual progress.[141] Professor Jeremy Waldron writes that:

> Ethical confrontation, we have seen, is a positive good for Mill: it improves people and promotes progress. But ethical confrontation is not a painless business. It always hurts to be contradicted in debate, if one takes seriously the views one is propounding . . . . If nobody is disturbed, distressed, or hurt in this way, that is a sign that ethical confrontation is not taking place, and . . . that the intellectual life and progress of our civilization may be grinding to a halt.[142]

In summary, we may say that the ideas of coercion, and of unjustified coercion, are applied by Justice Kennedy in *Lee* in an expansive, encompassing way. The basic problem is that this approach, however defensible, is certainly not required by the idea of coercion itself. The idea of coercion is equally susceptible to reasonable alternative readings[143] and case outcomes. We can of

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[138] *Id.*

[139] Jeremy Waldron, *Mill and the Value of Moral Distress, in* LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 115, 124 (1993).

[140] *Id.* at 144.

[141] *Id.* at 94-98.

[142] Jeremy Waldron, *Mill and the Value of Moral Distress, in* LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 115, 124 (1993).

[143] *See* Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 483 (2009) ("As currently described, it is impossible to know whether the coercion test is very forgiving, very demanding, or somewhere in between."). Actually, the idea of coercion cannot be reduced to any of these alternatives, singly or in combination.

course hardly fault a judicial opinion writer for failing to solve problems, even in a specific context, left unresolved by generations of specialist philosophers. But our properly limited expectations of what the courts can accomplish[144] do not make the idea of coercion useful as the basis of an Establishment Clause test.

B. The Coercion Issue in Santa Fe *and Beyond*

The later case of *Santa Fe Independent School District v. Doe*[145] involved several factual departures from *Lee*, but Justice Stevens's opinion for the majority largely tracked that of Justice Kennedy in *Lee*.[146] *Santa Fe* involved a Texas public high school football game, rather than a middle school commencement, and an invocation that was insulated from school authorities by means of an authorized student majority vote to allow for some sort of pre-game solemnization, and then a separate student majority vote to select a particular student speaker.[147]

Interestingly, the Court in *Sante Fe* ignored one consideration that could arguably have been relevant to their coercion analysis. The Court referred to a prior invocation at a commencement ceremony in which the student began the invocation ceremony with the words, "Please bow you heads."[148] Of course, the superficial form of "Please bow your heads" is compatible with that of a mere polite request, subject to refusal without any explicitly threatened penalty. But the superficial grammar of the phrase carries us

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[144] Some critics find no judicial choice among obvious alternative readings of coercion in *Lee*. *See, e.g., id.* Justice Kennedy makes something of a start in that regard; the more basic problem is that he could just as well have elaborated a coercion test in various other ways. Justice Scalia characterizes Justice Kennedy's general approach as involving "a boundless, and boundlessly manipulable, test of psychological coercion." Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting). Yet Justice Scalia seems to conclude that a simple written disclaimer would solve the coercion problem. *See id.* at 644-45 (Scalia, J., dissenting). One must ask whether Justice Scalia's disclaimer approach is, on his view, genuinely well-justified, in which case the coercion test deserves more credit than Justice Scalia accords to it, or whether it is merely an equal and opposite manipulation to that of Justice Kennedy, in which case the specific approaches and applications of both Justice Kennedy and Scalia would seem arbitrary. The more basic and distinctive problem is that the idea of coercion itself, let alone justified or unjustified coercion, must be fleshed out in one way or another with considerations taken into account on any sensible alternative theory of the Establishment Clause.

[145] 530 U.S. 290 (2000).

[146] *See id.* at 301-02, 312 (quoting key passages from *Lee*).

[147] *See id.* at 303-07, 310.

[148] *Id.* at 295 n.2.

only so far.[149] While most commands are not preceded by Please—"Please drop your weapons" is striving for an effect—some are: Mass-transit commuters are familiar with (often) automated requests "Please step away from the doors"; "Please move to the rear of the car"; "Please do not block the aisle"; etc. These superficial requests are really, in substance, more in the nature of something like imperatives or instructions. The "please" is intended to take the edge off the tone that would otherwise be conveyed in a typically stressful social context.

Typically, in the context of an invocation before a more or less diverse group, the word "please" might operate to take the peremptory tone off the injunction "bow your heads." But the phrase as a whole still, in the cultural context, normally conveys a sense of authoritative social expectation. Formal punishment for noncompliance is typically unnecessary. "Please bow your heads" operates, under established expectations, to coordinate the nature and timing of group behavior. This function of the language in question is certainly compatible with the possibility of coercion.

What is of specific interest here is that despite the emphasis on coercion in both *Lee* and *Santa Fe,* no attention is paid to the possible difference between an invocation preceded by a request to bow one's head, and an invocation not so preceded. A bowed head in response to a summons to collective bowing can readily be visually observed by many of those present, as can a head that remains unbowed despite an injunction to the contrary. An unbowed head, under the circumstances, is readily interpreted as not just absentmindedness or inattention, but as an unequivocal signal of a deliberate refusal to bow one's head, indicating some sort of conscious dissent or refusal.

In some such circumstances, an evident refusal to bow one's head might well invite social sanctions far more clearly than merely remaining motionless, along with everyone else, during an invocation. Refusing to bow one's head under such circumstances could thus more plainly risk significant costs, with far less "plausible deniability" than merely remaining motionless and silent along with one's peers.

Bowing one's head in response to an explicit request to do so, in contrast, may indicate entirely voluntary consent and affirma-

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[149] For sophisticated discussion, see J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975); PAUL GRICE, STUDIES IN THE WAYS OF WORDS (rev. ed. 1991); S. I. HAYAKAWA & ALAN HAYAKAWA, LANGUAGE IN THOUGHT & ACTION (5th ed. 1991); JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969).

tion, but may well also indicate that one has been successfully subjected to coercive influence to act as one would not otherwise act. Adding further murkiness to the situation is that even in the absence of any explicit request for head-bowing, there may be a local custom or expectation of head-bowing, known to dissenters, who may realistically expect some degree of social disapproval for not bowing their heads, even in the absence of any explicit request.

The bottom line here seems to be that a verbal request for a bowing of heads may facilitate coercion by highlighting visible non-compliance. But a court, as in *Lee,* can certainly still find the presence of a sufficient—or excessive—coercive influence even if it is not possible to visually distinguish dissenters from non-dissenters. All of this serves to add a further level of complexity to coercion tests for Establishment Clause violations.

The Court in *Santa Fe,* in fact, then went on to note that some students were effectively required to be physically present at the football game.[150] Of this number, we may assume some would not be able to render themselves entirely inconspicuous at the time of the invocation without a great deal of expense. A bit more controversially, the *Santa Fe* majority then speaks precisely of all those students with a "truly genuine desire"[151] to attend the game. It is unclear whether the Court means to suggest that a government's taking advantage of any "truly genuine desire" always, as a matter of a proper choice of baseline, amounts to coercion. That one has a truly genuine desire, of whatever intensity, to do something tells us little about how one values or thinks about alternative activities. Another possible reading would be that the government ought not, as a moral or constitutional matter, take advantage of the presence of such students by authorizing a religious invocation.[152] This approach would be perfectly sensible, but it would also appear to decide the Establishment Clause case in advance of working through any serious coercion analysis.

It would also be easy to argue that any questions of student motivation or coercion in appearing at the football game itself need not be decisive on the overall Establishment Clause coercion test. A student might appear at the football game, as a spectator, on the merest personal whim, and be indifferent to remaining. That student would hardly be coerced by anyone in attending the

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[150] *See Santa Fe,* 530 U.S. at 311.

[151] *Id.* For an attempt to apply the free speech principle of a "captive audience" to a case involving music at a graduation ceremony, see *Nurre v. Whitehead,* 580 F.3d 1087, 1094 (9th Cir. 2009).

[152] *See Santa Fe,* 530 U.S. at 311-12.

game. But if that student is also unaware of, or has forgotten about, the practice of an invocation, such a student could still find herself coerced to respond to a religious invocation in some arguably positive fashion. A student need not have been coerced into attending an event in order to amount, briefly, to a captive audience for unanticipated religious speech.

The school system's attempts in *Santa Fe* to insulate itself from any religious character of the student's speech were deemed unavailing. Certainly it is possible for a school to intentionally structure a superficially neutral selection process to systematically favor a religious invocation, especially where a dominant majority faction of students is so disposed.[153] And the school system must ultimately bear responsibility for any continuing or reasonably foreseeable pattern among the student speeches at official commencement ceremonies.[154] In *Santa Fe*, the school authorities themselves recognized at least some degree of official responsibility through their requirement that only "appropriate"[155] messages be delivered on such occasions.

Ultimately, though, the degree of official responsibility for any socially-based coercive effect of a student prayer may sometimes depend, in some hopelessly vague and indeterminate way, on the gradually accruing historical pattern of student speeches at commencement. Would we be willing to find a public school responsible for any coercion if, on a single unprecedented occasion, and contrary to school policy and a uniform history, a student-selected commencement speaker departed from a prepared secular text to deliver a brief prayer?[156] Would we find, in contrast, sufficient school "insulation" from any religious coercive effect if, on (only) seven out of seventeen total occasions, the students had voted for either no student speaker or for a secular theme?[157] Would we not find the public school sufficiently implicated in or responsible for

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[153] *See id.* at 310-11.

[154] For an unconvincing attempt by one school system to disclaim responsibility for student speeches at official graduation ceremonies, see *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc) (seeking to distinguish *Santa Fe* in light of a different mix of speeches, legislative history, and disavowal by the school of responsibility for the content of the speeches). For a critique of *Adler*, see Paul Horowitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in* Adler v. Duval County, 63 U. MIAMI L. REV. 835 (2009).

[155] *Santa Fe*, 530 U.S. at 304.

[156] For loosely relevant free speech law, see *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

[157] *See Adler*, 250 F.3d at 1339.

any socially-based religious coercion if the student speeches were consistently religious over time, to the point of predictability?[158]

The problem here, in particular, for any coercion test is that of determining, in the rich, detailed historical context of any contested case, whether to find a sufficient linkage between religious coercion by private actors and the acts, omissions, intentions, and states of awareness on the part of school authorities. In the absence of any determinate, widely accepted fleshing out of a theory of coercion and responsibility, we may again anticipate that a coercion test will in this regard merely reflect the Establishment Clause jurisprudence of the courts developed on grounds apart from coercion.

V. CONCLUSION

At this point, it should be clear that, in the contexts with which we are concerned, the idea of coercion, in the hands of lay people, technical philosophers, or judges, is itself hopelessly indeterminate. The concept must be fleshed out, or somehow "moralized," in individualized contexts[159] in accordance with various particular choices of "baseline" rights and other inescapably controversial normative judgments. Even worse, though, is that in our contexts, judgments as to what is coercive, "excessively" coercive on some sliding scale of coerciveness,[160] or unjustifiably coercive, must inevitably track many of the same considerations that are already considered important on any sensible alternative approach to the Establishment Clause. A coercion test, even as a way of organizing one's thoughts, at best contributes nothing of distinctive value to Establishment Clause jurisprudence.

This is not to suggest, of course, that the idea of coercion is in all possible contexts legally unimportant. We have, for example, presumably come some distance from a now century-old judicial reference to "the womanish plea of duress."[161] But however more enlightened we may be today in our richly varied, if murky, under-

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[158] *See Santa Fe*, 530 U.S. at 310.

[159] Consider, for example, the possibility that coercive force could depend on factors such as the size, insularity, or homogeneity of the school or local community. *See* Green v. Haskell County Bd. of Comm'rs, 574 F.3d 1235, 1236 n.3 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing en banc).

[160] Coerciveness is sometimes thought of as a matter of degree. *See, e.g.*, WERTHEIMER, *supra* note 5, at 185; Held, *supra* note 78, at 59 ("Degree of coercion seems to be a function of the undesirability of the outcome and the probability of its occurring . . . .").

[161] Wood v. Kan. City Home Tel. Co., 123 S.W. 6, 15 (Mo. 1909); *see* WERTHEIMER, *supra* note 5, at 15.

standing of coercion, the idea of coercion still contributes nothing of value to our Establishment Clause case law, beyond other sensible approaches to that Clause.

Alternatives to a coercion theory may potentially offer certain advantages, in that there is clearly a significant difference between coercion on the one hand and the separate idea of discrimination on the other.[162] The important distinction between coercion and discrimination also holds in Religion Clause contexts.[163] To the extent that the idea of religious coercion does not capture all that is considered by the idea of official religious discrimination, a focus on religious coercion alone may well be deficient.

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[162] *See, e.g.*, MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY 119 (2010) (implicitly distinguishing between coercion and discrimination in religious contexts) (quoting Kent Greenawalt, *History as Ideology: Phillip Hamburger's Separation of Church and State*, 93 CAL. L. REV. 367, 390-91 (2005)); *see also* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 533 (2008).

[163] *See supra* note 162. We can, for example, imagine a public school that gives modest official rewards, perhaps even only on a one-time, after-the-fact basis, for approved religious behavior, and thus clearly discriminates among its students on some favored religious basis, without coercing or seeking to coerce anyone's behavior or belief.